Magistrate sentenced the appellant to one year imprisonment and 6 strokes of the rottan, such sentence to be followed by Police supervision for a period of one year under section 295(i)(b) of the Criminal Procedure Code. The appellant was also ordered to make restitution.

The appellant had six previous convictions, two of which were for theft under section 380 and 379 of the Penal Code committed in 1930 and in 1953, respectively; in view of these previous convictions the learned Magistrate thought it fit to inflict whipping. There is no question that the sentence of whipping was legal and although on appeal the Court is reluctant to interfere with the discretion of the Court below in inflicting a sentence which is in accordance with the law, in this case I considered that except in very bad cases, the punishment of whipping should be reserved for crimes of violence.

I, therefore, altered the order of the learned Magistrate and set aside the sentence as regards whipping.

Order accordingly.

REG. v. NG HEE WENG & ORS.

[C. A. (Hill, Buhagiar and Good JJ.) April 6, 1956]

[K. L. — F. M. Criminal Reference No. 1 of 1956]

Customs Ordinance, 1952, s. 123 — Whether this gives discretion to Court to order forfeiture or release of vehicle used in commission of offence.

Where a vehicle used in the commission of an offence had been seized by a customs officer under s. 110 of the Customs Ordinance, 1952, and if it is proved to the satisfaction of the Court that the vehicle had been so used, s. 123 of the said Ordinance gave no discretion to the Court, but render an order for forfeiture mandatory.

[**Editorial Note:** In **Re Ng Ham**[1] prohibited goods were attempted to be exported in a Kotak. The Magistrate ordered forfeiture of the prohibited goods but not the Kotak itself. In his grounds of decision in that case Wilson J. said: "Kotak S. 10, No. 1083 was a vessel liable to seizure by any officer of Customs under s. 110 of Ordinance No. 142 of 1952. Section 122 of the same Ordinance provides that all goods liable to seizure under the provisions of this Ordinance shall be liable to forfeiture. Section 123 of the Ordinance provides that if it is proved to the satisfaction of the Court that an offence against this Ordinance has been committed, an order for the forfeiture of goods liable to forfeiture shall be made if the goods were used in commission of the offence.

The learned Magistrate, having convicted the accused of the offence set out above, ought to have ordered the forfeiture of the boat and there was no alternative under the law. . . . . It is immaterial that the boat did not belong to the convicted person."].

Cases referred to:—

(1) *Re Ng Ham* K.L. — Criminal Revision No. 30 of 1954 — unreported.

(2) *Goh Tong v. Public Prosecutor* (1953) M.L.J. 251.

CRIMINAL REFERENCE to the Court of Appeal.

D. C. Jackson (Ag. Solicitor-General) for the appellant.

D. G. Ironside assigned to argue the Reference.

Good J. (delivering the judgment of the Court): — The question, which comes before us by way of reference under section 34(1) of the Courts Ordinance, 1948, is whether section 123 of the Customs Ordinance, 1952 gives a discretion to the Court to order the forfeiture or the release of a vehicle used in the commission of an offence against the Ordinance which has been seized by an officer of customs under section 110 of the Ordinance, or whether forfeiture is mandatory if it is proved to the satisfaction of the Court that the vehicle was so used.

In this case, uncustomed goods were found in a motor car which had been taken across by the ferry from Penang to Province Wellesley, and one of the passengers in the car pleaded guilty to, and was convicted of, an offence under section 131(1)(e) of the Ordinance. The motor car used in the commission of the offence was a hired car. The learned President of the Sessions Court, Butterworth, who tried the case, found that neither the owner nor the driver of the car had any knowledge of the commission of the offence by the passenger; and on application being made by the prosecution for the forfeiture of the car, he held that forfeiture was a matter of discretion and refused the application.

The Crown appealed against the decision of the learned President. The learned Judge who heard the appeal, feeling himself bound by the unreported decision of Wilson J. in Criminal Revision No. 30 of 1954, *Re Ng Ham*[1], allowed the appeal; but for reasons set out in the reference before us, the learned Judge doubted the correctness of the decision in that case, and consequently took the step, approved in *Goh Tong v. Public Prosecutor*[2] of referring the matter to this Court for decision.

We have given careful consideration to the very full reasons given by the learned Judge and by the learned President for the view that the forfeiture of a conveyance used in the commission of a customs offence is discretionary, and to the arguments which Counsel assigned to argue the point on behalf of the owner of the motor car put forward in support of that view, but we have come to a different conclusion.

The question is whether "goods", in the expression "an order for the forfeiture of goods" which appears in section 123, includes a conveyance used for the

carriage of goods in the commission of an offence against the Ordinance. Section 2(1) of the Ordinance defines "goods" in these terms :—

> " 'goods' includes animals, birds, fish, plants and all kinds of movable property;".

There can be no question that, *prima facie,* the words "all kinds of movable property" are sufficiently wide to include a conveyance of any kind in any circumstances. All the definitions in section 2(1) are, however, subject to the opening words of the sub-section, "In this Ordinance unless the context otherwise requires.....". It is perfectly clear that in section 110(1) the context does otherwise require; for that sub-section begins by specifying the goods that may be seized and then goes on to make separate provision for the seizure of receptacles, packages, conveyances, vessels and aircraft. It follows that the receptacles, packages, conveyances, vessels and aircraft referred to in that sub-section are excluded from the definition of "goods", and that the expression "goods" in the first line of the sub-section must be construed as meaning movable property other than the receptacles, etc. which are referred to subsequently. In our view the reason for this is that the sub-section confers extremely wide powers upon customs officers down to the lowest level, and upon all police officers, and is therefore drafted in such a way as to leave these officers in no doubt whatever as to what their powers are in respect of seizure and what they are empowered to seize.

We have considered whether in section 123 the context requires that "goods" should be construed as excluding receptacles, packages, conveyances, vessels and aircraft, and we have come to the conclusion that it does not. We are of the opinion that the words "that the goods were the subject matter of or were used in the commission of the offence" clearly show that what the legislature had in mind was to make forfeiture mandatory in the case of

(a) goods which were the subject matter of the offence; and

(b) goods which were used in the commission of the offence.

In our opinion the goods in category (a) are the goods referred to in the first part of section 110(1) i.e. "goods in respect of which there has been, or there is, reasonable cause to suspect that there has been committed any offence against this Ordinance or any regulation made thereunder, or any breach of any of the provisions of this Ordinance or of any regulation made thereunder or of any restriction or condition subject to or upon which any licence or permit has been granted"; and that the goods in category (b) are the receptacles, packages, conveyances, vessels and aircraft mentioned in the second part of section 110(1) i.e. those in which the goods first mentioned may have been found or which have been used in connection with such offence or breach.

We do not consider that in the first part of section 123 the words "an order for forfeiture or for the release of anything liable to forfeiture under the provisions of this ordinance shall be made by the Court before which the prosecution with regard thereto has been held" confer any discretion at all. In our view these words merely declare, as the learned Acting Solicitor-General put it in the course of his argument, the forum by which forfeiture or release may be ordered. The question whether the order should be for forfeiture or for release is in our view governed by the second part of the section. If the matters specified therein are proved to the satisfaction of the Court the Court must order forfeiture both of the goods which were the subject matter of the offence and also of the goods (i.e. receptacles, packages, conveyances etc.) which were used in the commission of the offence, while if such matters are not proved to the satisfaction of the Court then the Court must order the release of the goods including any receptacles, packages, and conveyances in which they may have been found.

Our view of section 123, which deals with forfeiture, is that it neatly reflects the wording of section 110(1), which deals with seizure. Section 110(1) does not, as we read it, draw a distinction between goods on the one hand and receptacles, packages, conveyances, etc. on the other. What it does is to enumerate the things which are liable to seizure, and it does this by setting them out cumulatively in the two categories which we have set out as (a) and (b) above. Section 123 then comes into operation. It starts off by prescribing the authority empowered to order the forfeiture or the release, as the circumstances may require having regard to the provision which follow,

of anything the disposal of which is rendered necessary by reason of its having been seized under section 110(1). The section then goes on to provide for the disposal of the two categories of things which may be seized under section 110(1). For the purpose of disposal these are to be treated alike, that is to say, forfeiture must be ordered if they are proved to the satisfaction of the Court to fall into either category. In order to achieve this effect, the draftsman has resorted to using the expression "goods" in the sense of the original definition in section 2, which is applicable, to, and embraces, both categories of things which may be seized.

We are therefore of the opinion that the learned President had no discretion to order the release of the motor car and that the appeal was properly allowed in accordance with the principle laid down by Wilson J. in *Ng Ham's*[1] case.

Order accordingly.

MOHAMED YUSOFF
v. PUBLIC PROSECUTOR

[Cr. R. J. (Buhagiar J.) April 11, 1956]

[K. L. — Criminal Revision No. 6 of 1956]

Penal Code s. 292 — Obscene pictures — Criminal Procedure Code (Cap. 6), s. 407(ii) — Order of forfeiture or destruction.

Section 407(ii) of the Criminal Procedure Code (Cap. 6) confers power on the Court to make an order not only for the forfeiture or confiscation but also for the destruction of property regarding which the offence is committed.

The proper order in connection with offences under s. 292 of the Penal Code should be one for destruction and not for confiscation and where such order is made the Magistrate should take such action as may be necessary to ensure that the order is carried out and satisfy himself that it has been carried out. It is also advisable for the Magistrate to certify on the relevant record that he is satisfied that the order has been carried out.

CRIMINAL REVISION.

Buhagiar J. : — My attention was drawn to Arrest Case No. 3085 of 1956 in the Magistrates' Court at Kuala Lumpur, in which the defendant was charged with being in possession of obscene pictures, an offence under section 292 of the Penal Code.

The defendant pleaded guilty and on such plea the learned Magistrate convicted the defendant and imposed a fine of $500 and in default two months' imprisonment. The learned Magistrate made an order that the pictures be confiscated. There is no question that this order is perfectly legal but in my view it is not the proper order to be made in cases of this nature. Section 407 (ii) of the Criminal Procedure Code confers power on the Court to make an order not only for the forfeiture or confiscation but also for the destruction of property regarding which the offence is committed. In the present case the proper order to be made is that for the destruction of the pictures.

In exercise, therefore, of the revisionary powers conferred on a Judge by Chapter XXXI of the Criminal Procedure Code I substitute an order for destruction for the order for confiscation, and direct the Registrar of the Supreme Court to ensure that this order is carried out.

I may also add that in cases where exhibits in connection with offences under section 292 of the Penal Code are produced, it is desirable that the Magistrate keep such exhibits under his personal control during the trial or take such steps as may be necessary to ensure that such exhibits do not come in the hands of any persons except in so far as it may be necessary for the proceedings and that where the order for the destruction is made the Magistrate take such action as may be necessary to ensure that the order is carried out and satisfy himself that it has been carried out. It is also advisable, in my view, for the Magistrate to certify on the relevant record that he is satisfied that the order has been carried out.

Order accordingly.

NG KIM PONG v. GOH CHING (f)

[C. A. (Mathew C.J., Whyatt C.J. (S) and Good J.) January 30, 1956]

[K. L. — F.M. Civil Appeal No. 54 of 1955]

Landlord and Tenant — Surrender of lease by operation of law.

In this case the plaintiff-respondent leased to the appellant for a period of four years a plot of land on which there was a cinema building. A memorandum of